IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CAROTHERS CONSTRUCTION, INC.,
Plaintiff

V. NO. 3:94CV95-B-D

MIDWEST MECHANICAL CONTRACTORS, INC.,
Defendant

MEMORANDUM OPINION

This cause comes before the court on the defendant's motion to dismiss or stay proceedings and to compel arbitration.[1] The court has duly considered the parties' memoranda and exhibits and is ready to rule.

This action arises out of a subcontract between the plaintiff prime contractor and the defendant subcontractor to perform certain work in the construction of a psychiatric facility. Upon notice that the plaintiff would not honor the defendant's claims for additional compensation, the defendant filed a Demand for Arbitration. The complaint seeks a declaratory judgment that the defendant is not entitled to proceed with arbitration since its claims are prohibited and barred by the terms and conditions of the

[1]The defendant previously filed a motion to dismiss or, in the alternative, to stay in response to the court's requirement of additional briefing following oral argument on the plaintiff's motion for a preliminary injunction. The recent motion reiterates the defendant's request to dismiss or stay this proceeding pending binding arbitration.

subcontract and, in the alternative, a declaratory judgment that the defendant is required to submit its claims through the plaintiff to the Owner of the facility. The complaint further seeks a permanent injunction prohibiting arbitration. The plaintiff moved for a preliminary injunction on the ground that the defendant is procedurally estopped from arbitrating or otherwise waived its claims. The court denied the motion and the plaintiff has moved for summary judgment asserting the same defenses to the defendant's claims.

The subcontract clearly contains an arbitration agreement as follows:

> 26.1. Unless otherwise prohibited by this Subcontract or barred by the Subcontractor's failure to adhere to terms and conditions of this Subcontract, all claims, disputes, and other matters in controversy or question between the Contractor [plaintiff] and the Subcontractor [defendant] arising out of or relating to this Subcontract shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Abitration (sic) Association, except as specifically excluded below.

The parties deleted paragraph 26.1.3 providing that the contractor has the option to litigate any controversy between the contractor and the subcontractor. The plaintiff contends that the defendant's claims are "barred by the Subcontractor's failure to adhere to terms and conditions of this Subcontract" and thus not arbitrable under paragraph 26.1. The plaintiff alleges that the defendant's claims are barred on the ground of noncompliance with timely notice and written change order requirements set forth in the subcontract. The plaintiff further contends that the

defendant's claims are prohibited by the defendant's execution of waivers.

The issues before the court are the existence of a written agreement to arbitrate and whether the issues raised fall within the reach of the agreement. In re Complaint of Hornbeck Offshore (1984) Corp., 981 F.2d 752, 754 (5th Cir. 1993). The unambiguous arbitration clause in the parties' subcontract raises a presumption of arbitrability in accordance with the federal policy favoring arbitration agreements. Torrence v. Murphy, 815 F. Supp. 965, 970-71 (S.D. Miss. 1993); Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil, 767 F.2d 1140, 1145 (5th Cir. 1985). It is well settled that:

> as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability.

City of Meridian v. Algernon Blair, Inc., 721 F.2d 525, 527-28 (5th Cir. 1983) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 785 (1983)). Once the court determines that the subject matter of the dispute is arguably referable to arbitration, it is for the arbitrator, not the court, to decide whether the dispute may be arbitrated, e.g., procedural questions which bear on the final disposition of the dispute. Alabama Power Co. v. Local Union No. 391, IBEW, 612 F.2d 960, 962-63 (5th Cir. 1980); Wiley & Sons, Inc. v. Livingston, 376 U.S. 543,

557, 11 L. Ed. 2d 898, 909 (1964). The Fifth Circuit in Algernon Blair, Inc. held:

> Even if Blair does not have what we consider to be a valid substantive claim, the courts do not have the authority to enjoin arbitration on that ground. That is for the arbitrator to decide. Once we determine that the subject matter of the dispute is covered by the arbitration clause and that the party initiating arbitration is covered by the clause, we must allow the matter to be submitted to arbitration. Our sole function is to determine whether arbitration should be commenced; we play no part in determining the strength of claims and defenses presented.

721 F.2d at 528-29. Accordingly, the plaintiff's allegations that the defendant's claims are invalid or waived do not remove those claims from the purview of the arbitration clause.

In the alternative, the plaintiff contends it has the contractual right to forego arbitration and require the defendant to submit all of its claims through the plaintiff to the Owner. Paragraph 26.1.1 provides in part:

> At the Contractor's sole election, this agreement to arbitrate shall not apply to any claim, dispute, or other matter in controversy or question between the Subcontractor and the Contractor if the Contractor has a claim or dispute involving the same matter, either in whole or in part, with the Owner. In such event, if so elected by the Contractor, the Subcontractor shall prosecute its claim or resolve its dispute by timely submission of same through the Contractor to the Owner....

This provision is one of the exclusions referred to in the arbitration clause and is expressly limited to the plaintiff's claims against the Owner that overlap, in whole or in part, with the defendant's claims. This claim was rendered moot on June 30,

1995, the date the parties executed a Claims Presentation and Prosecution Agreement whereby the parties agreed to submit all claims "for which it may be fairly contended that TDCJ [Owner] has responsibility, in whole or in part," to a mediation panel through the Owner's recently modified dispute resolution procedure. See Section II, paragraph 5.

The defendant contends that the Claims Presentation and Prosecution Agreement ratifies and confirms the parties' previous arbitration agreement in that it contemplates a two-step procedure: 1) submitting certain claims to mediation with the Owner; and 2) depending on the outcome, submitting the remaining claims to the arbitration panel previously selected by the American Arbitration Association. It is apparently the plaintiff's position that the recent agreement exclusively pertains to claims against the Owner, and yet, the plaintiff acknowledges that arbitration of the defendant's claims against the plaintiff has been temporarily postponed pending the conclusion of the Owner's dispute resolution procedure. See Section III, paragraph 19. Paragraph 10 of section III entitled "Agreements" provides in pertinent part:

> Each party reserves the right to arbitrate against the other party any claim not submitted to TDCJ [Owner] and any claim not fully and finally decided by TDCJ or its tribunal to be the liability of TDCJ.... [I]f the TDCJ denies recovery to a party but does not determine that the TDCJ is responsible for the claim (except any claims the parties agree in advance are solely against the TDCJ) then that claim is reserved and preserved for a party to take against the other.

The plaintiff cites the following provisions in the recent agreement to show that it has not admitted that the defendant has a right to arbitrate:

> The parties agree that by submitting claims to TDCJ Carothers does not waive any of its defenses which it asserts it has to said claims, including the alleged defense that Midwest and its subcontractors have waived their claims. [Section III, paragraph 2.]
>
> . . . .
>
> This Agreement and actions taken pursuant thereto, including the positions taken verbally and in writing, shall not be considered admissions of any kind whatsoever in any action between the parties.... [Section III, paragraph 17.]

The plaintiff again confuses the merits of the defendant's claims with the issue of arbitrability. The remaining language in paragraph 17 provides that the agreement and actions taken pursuant thereto may be used "for the purpose of enforcing the terms of the Agreement itself" but not to show that the plaintiff "has acknowledged the validity of the [defendant's] claims in the arbitration or its liability for any portion thereof" or that the defendant has admitted, in whole or in part, that the Owner and not the plaintiff is responsible for the payment of its claims.

The court finds that paragraph 26.1 of the subcontract (arbitration clause) and paragraph 26.1.1 are not mutually exclusive as to all of the defendant's claims. By the terms of the Claims Presentation and Prosecution Agreement, the defendant has agreed to the plaintiff's exercise of its option, set forth in paragraph 26.1.1, to submit claims for which the Owner is arguably

liable, in whole or in part, through the plaintiff to the Owner. Any remaining claims, i.e, "any claim not submitted to TDCJ and any claim not fully and finally decided by TDCJ or its tribunal to be the liability of TDCJ," fall within the scope of the arbitration clause. The parties expressly reserve the right to arbitrate such claims. See Section III, paragraph 10. Paragraph 10 further provides:

> The parties recognize that they might not receive from the TDCJ or its tribunal a definitive decision as to what has been resolved and thus the determination as to what is reserved and preserved may require the parties to exercise good faith and trust each with the other and the parties agree to do so.

Paragraph 10, read in conjunction with paragraph 20 of section III, suggests the arbitrability of not only the remaining claims but also any dispute as to which claims are unresolved at the conclusion of the Owner's dispute resolution procedure. Paragraph 20 provides:

> The parties agree that any dispute between them in connection with this Agreement and the procedures to be followed and sums to be paid shall be resolved by binding arbitration by the panel of arbitrators already appointed under the Rules of the American Arbitration Association.

Since the court cannot conclude "with positive assurance" that the arbitration clauses in the subcontract and in the Claims Presentation and Prosecution Agreement are "not susceptible of an interpretation which would cover the dispute at issue...a stay pending arbitration should be granted." Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979). For the foregoing

reasons, the court finds that the defendant's motion for a stay pending arbitration is well taken and this action will be stayed pursuant to the Federal Arbitration Act, 9 U.S.C. § 3.

An order will issue accordingly.

THIS, the _____ day of September, 1995.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE